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SUPREME COURT, U.S.

NO. 80-5123

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DUNCAN PEDER McKENZIE, JR.,

PETITIONER,

ORIGINAL COPY

-v-

STATE OF MONTANA,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether, taken as a whole, the trial court's jury instructions regarding proof of the offense of aggravated kidnapping shifted the burden of proof of an element of the crime to the defendant?

2. Is so, whether a jury instruction which could have the effect of placing the burden of proof as to an element of the crime on the defendant may ever be deemed harmless error in a capital case?

3. If the first two questions are properly presented and answered in the affirmative, whether the Montana Supreme Court applied the proper standard in determining that the giving of the instruction complained of was harmless error?

4. Whether the execution of the death penalty under the 1973 Montana death penalty statute would violate the petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

5. Whether an enforceable plea bargain agreement existed between the petitioner and the respondent?

6. Whether the introduction of evidence seized from the petitioner's home and truck pursuant to a search warrant violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution?

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JURISDICTION AND CITATION TO OPINION BELOW

The respondent accepts the petitioner's citation of the opinions below and jurisdictional statement.

STATUTES INVOLVED

In addition to the statutes cited by the petitioner this case involves the following sections of the Revised Codes of Montana, 1947 (hereinafter cited as R.C.M. 1947): 94-2-101(52) (now codified at 45-2-101(52), Mont.Code Ann.), 95-2201 (now codified at 46-18-101, Mont.Code Ann.), 95-2203 (now codified at 46-18-111, Mont.Code Ann.), 95-2204 (now codified at 46-18-112, Mont.Code Ann.) and 95-3214 (Supp. 1974). The omitted sections are set forth in the appendix at A-1. 1/

STATEMENT OF THE CASE

The petitioner was convicted of the offense of aggravated kidnapping and deliberate homicide in the torture, rape, and murder of a young woman. The victim, a rural school teacher, was reported missing on January 22, 1974. Her body was discovered January 23, 1974, clothed only in a shirt, sweater, and bra. Expert testimony established that she had been savagely beaten with a heavy, blunt object, the death blow laying open the right side of her head. (Tr. at 560-71, 577-79, 1397.) In addition, the pathologist testified that a rope had been used to garotte the victim and that she would have died of strangulation had the rope not been released. (Tr. at 553, 585-94, 717-19.) She had

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1/ Throughout this brief, reference is made to items reproduced in the Appendix to the Petition for Certiorari. Such references are abbreviated as follows: "Petitioner's App. at ___." Reference to "the appendix" or to "App." refer to the appendix to this brief.

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been raped. (Tr. at 601-04, 607, 613.) The evidence connecting the petitioner to the crimes is extensively stated in the opinion of the Montana Supreme Court. 608 P.2d at 434-36.

The petitioner's conviction and death sentence were affirmed by the Montana Supreme Court in 1976 with one justice dissenting. State v. McKenzie, 171 Mont. 278, 557 P.2d 1023 (1977) (hereinafter "McKenzie I"). The petitioner then filed his first petition for certiorari, alleging, inter alia, that the allocation to the defendant of the burden of proving the defense of diminished capacity under sections 95-502 and 94-2-103, R.C.M. 1947 (now codified at 46-14-102 and 45-2-103, Mont.Code Ann.), violated his rights under the decision of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1974). While the petition was pending, this Court decided Patterson v. New York, 432 U.S. 197 (1977). The Court then vacated the judgment of the Montana Supreme Court and remanded the case for further consideration in light of Patterson. McKenzie v. Montana, 433 U.S. 905 (1977).

On remand, the Montana Supreme Court reconsidered all of the issues raised on the petitioner's first appeal and again affirmed the convictions and sentence, again with one justice dissenting. State v. McKenzie, ___ Mont. ___, 581 P.2d 1205 (1978) (hereafter "McKenzie II"). The petitioner then filed his second petition for certiorari, alleging, inter alia, that the trial court's jury instructions failed to allocate properly the burden of proof as to the elements of the crimes charged. While this petition was pending, the Court decided Sandstrom v. Montana, 442 U.S. 510 (1979), holding that on the facts of that case, an instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts" violated the defendant's due process

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right to require proof beyond a reasonable doubt as to every element of the offense charged. The Court then remanded this case for further consideration in light of Sandstrom. McKenzie v. Montana, 443 U.S. 903 (1979).

On remand from this Court for the second time, the Montana Supreme Court again reconsidered all the issues presented by the petitioner and again affirmed the convictions and sentence with one justice dissenting. State v. McKenzie, ___ Mont. ___, 608 P.2d 428 (1980) (hereafter "McKenzie III"). The court denied a timely petition for rehearing, and the instant petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

The respondent respectfully requests that this Court deny certiorari because the judgment below turns upon the peculiar facts and circumstances of this case and fails to present significant constitutional issues. Much of the petitioner's argument is merely an attempt to re-litigate in this Court factual determinations made in the Montana courts which are supported by substantial evidence in the record. The petitioner also asks this Court to adopt constructions of state law at odds with the interpretations reached by the Montana Supreme Court, and to determine legal questions not supported by proper factual predicates. The judgment below is supported by the decisions of this Court, and the petition fails to demonstrate that this case presents constitutional issues of sufficient significance to warrant review by this Court.

I. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DID NOT SHIFT THE BURDEN OF PROOF IN VIOLATION OF SANDSTROM SINCE THE JURY'S VERDICT SHOWS THAT THEY FOUND EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT WITHOUT RESORT TO PRESUMPTIONS. THE QUESTIONS REGARDING THE

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APPLICATION OF THE HARMLESS CONSTITUTIONAL ERROR DOCTRINE TO SANDSTROM DEFECTS ARE THEREFORE NOT PRESENTED IN THIS CASE.

The court below found that the trial court's instructions contained "rebuttable presumptions that a person intends the ordinary consequences of his voluntary acts and that an unlawful act was done with an unlawful intent," and that the giving of instructions embodying these presumptions shifted the burden of proof in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975). McKenzie III, 608 P.2d at 457. The court then determined that the "constitutional error" was harmless beyond a reasonable doubt. The court's analysis went no further than to determine that the disfavored instructions were given to the jury, the court apparently concluding that the mere giving of the instructions constituted constitutional error. Id. at 456-57. The first two questions presented in the petition challenge the propriety of the Montana court's harmless error analysis. The respondent submits that in proceeding from the mere giving of the instructions to the question of harmless error, the court below omitted the necessary intermediate step of determining whether, on the facts of this case, the instructions in question had the burden-shifting effect condemned in Sandstrom and Mullaney. A proper analysis of the entire charge to the jury discloses that the trial court's instructions properly allocated the burden of proof. Since this is so, the Montana court's harmless error analysis was premature and presents no constitutional issue for review by this Court. Cf. Parker v. Randolph, 442 U.S. 62 (1979) (plurality opinion) (admission of "interlocking" confession of co-defendants does not violate Bruton; harmless error analysis therefore unnecessary).

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Jury instructions are intended to provide proper legal standards for a jury to apply in performing its fact-finding functions. See Gregg v. Georgia, 428 U.S. 153, 192-93 (1976); Bollenbach v. United States, 326 U.S. 607, 612 (1946). Instructions properly allocating the burden of proof have the effect of requiring the State to produce sufficient evidence to move the jury to conclude the existence of all factual elements of the crime beyond a reasonable doubt, thus assuring that the verdict comports with due process of law. See In re Winship, 397 U.S. 358, 362-64 (1970). In Sandstrom and Mullaney, the trial courts gave the respective juries instructions that allowed them to return verdicts of guilty without requiring the State to prove each element of the crime beyond a reasonable doubt. An analysis of the instructions given in this case discloses no similar constitutional defect.

In Sandstrom, this Court held that the instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the principles announced in Winship and Mullaney. However, the crucial aspect of Sandstrom for purposes of this case, which neither the petitioner nor the Montana Supreme Court perceived, was the analytical process by which this Court reached its conclusion. Sandstrom does not hold that a trial court commits a constitutional error every time the presumption instruction is given, regardless of the circumstances of the case and the other instructions. The Court expressly noted that intent was the only fact at issue and that no other instructions were given by the trial court to ameliorate the burden-shifting effect of the presumption instruction. Sandstrom, 442 U.S. at 518 n. 7, 520-21. In any event, Sandstrom signals no retreat from the well-established rules

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that instructions must be reviewed in the context of the entire charge to the jury, Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); Sandstrom, 442 U.S. at 527 (Rehnquist, J., concurring), and that the court must assume that the jury has followed the given instructions. Parker v. Randolph, 442 U.S. 62, 73 (1979).

In this case, the petitioner was convicted of two capital offenses - deliberate homicide and aggravated kidnapping. While only one death sentence was imposed, the Findings of Fact and Conclusions of Law entered by the trial court disclose that the court considered either offense to be sufficient to support the death sentence. Petitioner's App. at 6h-7h. The respondent submits that the aggravated kidnapping conviction is free from any constitutional error under Sandstrom, and that the judgment and sentence of the trial court may therefore be upheld without reaching the constitutional harmless error questions presented in the petition and decided by the Montana Supreme Court. Here, unlike Sandstrom, the trial court gave numerous detailed instructions regarding proof of the mental state which is an element of the crime of aggravated kidnapping. If the Court assumes that the jury followed these instructions, it can assure itself that the State presented sufficient evidence to convince the jury beyond a reasonable doubt of the existence of each element of the offense charged, and that the jury made such findings without resort to any burden-shifting presumption.

Montana law defines the offense of aggravated kidnapping as a kidnapping committed with a particular purpose, inter alia, "to facilitate the commission of any felony or flight thereafter," or "to inflict bodily injury on or to terrorize the victim." Section 94-5-303, R.C.M. 1947, now

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codified at 45-5-303, Mont.Code Ann. Petitioner's App. at 2f. The petitioner was charged with aggravated kidnapping in alternative counts, one alleging that he kidnapped the victim with the intent to facilitate the commission of one of three enumerated felonies and the other alleging that he did so with the purpose to inflict bodily injury upon or to terrorize the victim. Court's Instructions 35 and 36, Petitioner's App. at 25g-28g, detail the "method of proof" for these counts. The jury was instructed that to convict on the aggravated kidnapping charge, they first must find beyond a reasonable doubt that the petitioner had kidnapped the victim, i.e., that he had "knowing or purposely, without unlawful [sic] authority, restrained Lana Harding by secreting her or holding her in a place of isolation, or by using or threatening to use physical force to hold her." Petitioner's App. at 26g. The jury was then informed that they could employ the Sandstrom presumption to find that the above act was done "purposely" or "knowingly." Once they had found a kidnapping, the jury was told, they could convict of aggravated kidnapping only if they found an additional particular purpose to inflict bodily injury on or to terrorize the victim, or to facilitate the commission of one of the enumerated felonies. Court's Instructions 32 and 36, Petitioner's App. at 21g, 27g, told the jury that they could not apply the Sandstrom presumption to find the particular purpose, but were rather to rely on inference alone. Court's Instruction 31, Petitioner's App. at 16g-20g, explained in detail the distinction between inferences and presumptions.

The jury could have convicted the defendant of aggravated kidnapping if they found that he "purposely" kidnapped the victim for the particular purpose of facilitating the

commission of a felony or inflicting bodily injury upon or terrorizing the victim. Under Montana law, "a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result." Section 94-2-101(52), R.C.M. 1947, now codified at 45-2-101(52), Mont.Code Ann. App. at A-1. Assuming that the jury followed Court's Instructions 32 and 36, their guilty verdict on the offense of aggravated kidnapping shows that they found, beyond a reasonable doubt and without resort to the Sandstrom presumption, that the petitioner entertained a specific purpose - i.e., that it was his "conscious object" - to facilitate commission of a felony or to inflict injury upon or terrorize the victim. There is no factual distinction between an act which is done "purposely" and one which is done "for a specific purpose." Section 94-2-101(52), now codified at 45-2-101(52), explicitly provides that the terms "purposely" and "with the purpose" have the same meaning. The jury's finding that the petitioner entertained an enumerated specific purpose in kidnapping the victim necessarily subsumes a finding that the kidnapping was done "purposely." Since the finding of specific purpose was reached without resort to presumptions, the finding that the underlying kidnapping was done purposely is not infected by the Sandstrom presumption. Under these circumstances, the giving of the Sandstrom instruction did not shift the burden of proof, and no constitutional error is therefore present.

In Parker v. Randolph, 442 U.S. 62 (1979), a plurality of this Court concluded that the introduction of "interlocking" confessions of co-defendants did not violate the rule of Bruton v. United States, 391 U.S. 123 (1968), and

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therefore declined to consider the question whether the admission of such a confession was harmless error. In this case, like Parker, it is unnecessary to consider the application of harmless error analysis to instructions which shift the burden of proof, since no such constitutional error is present. The Court should therefore deny the writ as to the first two questions presented by the petition.

II. THE COURT SHOULD DENY THE WRIT AS TO THE CONSTITUTIONALITY OF THE IMPOSITION OF THE DEATH PENALTY BECAUSE THE PROCEDURE THROUGH WHICH THE SENTENCE WAS IMPOSED IS CONSTITUTIONALLY INDISTINGUISHABLE FROM THOSE APPROVED BY THE COURT IN GREGG, PROFFITT, AND JUREK.

The petitioner presents three distinct challenges to the constitutionality of the death penalty. He alleges that the procedure through which the sentence was imposed is constitutionally infirm in that it fails to guide the discretion of the sentencer as required by Furman v. Georgia, 408 U.S. 238 (1972) and later cases, and in that it omits jury participation in the sentencing process. He also alleges the trial court's decision to impose the death penalty is based on faulty factual predicates.

A. The Sentencing Procedure Applied To The Petitioner Is Constitutionally Indistinguishable From Those Approved By The Court In Prior Cases.

The petitioner alleges that the procedures under which he was sentenced to death failed adequately to channel the discretion of the sentencer, and that the sentence therefore violates the principles announced in Furman v. Georgia, 408 U.S. 238 (1972), and explicated in later death penalty cases. Those principles were summarized in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759, 1764-65 (1980):

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> A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not. This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless discretion. It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process of imposing a sentence of death. (Citations omitted.)

In applying these principles, a state is not required to parrot every detail of the sentencing procedures which have been approved by this Court. The Court has, in fact, approved several divergent approaches to the problem of complying with Furman, see Lockett v. Ohio, 438 U.S. 586, 606-07 (1978), and has explicitly noted that "[t]here is no perfect procedure for deciding in which cases governmental authority should be used to impose death." Id. at 605. As the court below noted, McKenzie III, 608 P.2d at 450, those sentencing procedures approved by this Court share three constitutional requirements: (1) the range of cases to which the penalty may apply is narrowed by the requirement that one or more specific aggravating circumstances be found; (2) the sentencer must consider the facts and circumstances of the crime and the defendant, and a full range of mitigating circumstances; and (3) there must be prompt judicial review by a court of statewide jurisdiction. As construed by the Montana Supreme Court and applied to this petitioner, the death penalty statutes in effect when he was sentenced comply with these constitutional requirements.

The 1973 Montana death penalty statutes applied in this case, sections 94-5-105 and 94-5-304, R.C.M. 1947 (Supp. 1974), Petitioner's App. at 1f, 3f, specified six offenses

for which the death penalty could be imposed, each of which embodied an aggravating circumstance beyond the usual deliberate homicide or aggravated kidnapping. While the Georgia statute approved in Gregg v. Georgia, 428 U.S. 153, 165 n. 9 (1976), and the Florida statute approved in Proffitt v. Florida, 428 U.S. 242, 248 n. 6 (1976), provided a greater number of aggravating circumstances, the fact remains that by narrowly defining the crimes for which the death penalty could be imposed, Montana provided a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Gregg, 428 U.S. at 188, quoting Furman, 408 U.S. at 313 (White, J., concurring). The two aggravating circumstances found by the jury to be present here - deliberate homicide by means of torture and aggravated kidnapping resulting in the death of the victim - have counterparts in both the Florida and Georgia statutes approved in Gregg and Profitt. Compare section 94-5-105(1)(d), R.C.M. 1947 (Supp. 1974) with Ga.Code Ann. section 27-2534.1(b)(7) and Fla. Stat.Ann. sections 921.141(5)(h). Compare section 94-5-304, R.C.M. 1947 (Supp. 1974) with Ga.Code Ann. section 27-2534.1(b)(2). Gregg therefore disposes of the petitioner's claim here that the aggravating circumstances in the 1973 Montana statute found to be present in this case are too vague and overbroad to pass constitutional muster.

The Montana scheme also met the second constitutional requirement identified by this Court by providing mandatory consideration of a full range of mitigating circumstances. See Lockett v. Ohio, 438 U.S. at 604-05. See also Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). The Montana Supreme Court determined that the death penalty provisions of the criminal code could not be read in isolation from

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other sentencing provisions. McKenzie III, 608 P.2d at 450. The death penalty statutes provided for imposition of the death sentence "unless there are mitigating circumstances." Sections 95-2203 and 95-2204, R.C.M., 1947, now codified at 46-18-111 and 46-18-112, Mont. Code Ann., provide for preparation of a presentence report setting forth the circumstances of the offense and the individual characteristics of the defendant. As the court below noted, "[t]he report provides the sentencing authority with whatever circumstances may exist in mitigation of the defendant's conduct." 608 P.2d at 450. Further, a court is required to consider the "individual characteristics, circumstances, needs, and potentialities" of an offender when passing sentence. Section 95-2201, R.C.M. 1947, now codified at 46-18-101, Mont.Code Ann.; McKenzie III, 608 P.2d at 450. The court also held that the defendant in a capital case is entitled to a hearing in which he may present testimony and evidence in mitigation of punishment. Id. Montana recognizes no limit on the relevant factors which might be considered in mitigation. See Lockett, 423 U.S. at 605.

The petitioner argues that these holdings of the court below merely "paper over" the obvious facial defects in the Montana statutory scheme. Concededly, the statutes on their face do not provide explicitly for a full panoply of procedures such as those set forth in the Florida and Georgia statutes. However, as this Court made clear in Gregg, 428 U.S. at 201-03, and in Jurek v. Texas, 428 U.S. 262 (1976), the statutes cannot be read by this Court in isolation from the construction placed on them by the state's highest court. "State courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975). In Jurek, the petitioner alleged, inter alia, that the sentenc-

ing process did not require consideration of mitigating circumstances. This Court sustained the statute against this attack despite the lack of of any explicit requirement that the sentencer consider mitigating factors. The court noted that the Texas Court of Criminal Appeals had construed the statute broadly to require consideration of a wide range of mitigating circumstances, and held that as so construed the statute satisfied the constitutional requirement. 428 U.S. at 271-73. Similarly, although not all of the procedures recognized by the Montana Supreme Court are explicitly provided by the death penalty statute, the fact remains that the Montana statutes, including the general sentencing statutes, as construed and applied by the Montana Supreme Court and the trial court, provided the petitioner with all the procedural guarantees required by Furman and its progeny. He was tried and convicted for a crime found by the jury to be among the narrowly defined offenses for which the death penalty was statutorily authorized. He was accorded a hearing giving him a full opportunity to present evidence in mitigation of sentence. He was accorded prompt judicial review of his sentence by a court of statewide jurisdiction. The petitioner has cited no case in which this Court has held that the Constitution requires more of a capital sentencing procedure than the petitioner was afforded in this case.

B. The Allegation That Jury Participation Is Constitutionally Required Is Not Supported By The Record In This Case And The Decisions Of This Court.

The petitioner has alleged that the death penalty is unconstitutional in this case because of a lack of jury participation in the sentencing process. Initially, the assertion that there was no jury participation in this case

is false. The jury's verdict was accompanied by explicit findings beyond a reasonable doubt as to the existence of both aggravating circumstances found to be present in this case. Petitioner's App. at 5h. Further, this Court "has never suggested that jury sentencing is constitutionally required." Proffitt, 428 U.S. at 252. In Proffitt, this Court sustained a death sentence imposed by the trial judge. The lack of jury sentencing therefore does not raise a constitutional issue. See State v. Coleman, ___ Mont. ___, 605 P.2d 1000, 1017 (1979), cert. denied, ___ U.S. ___, 100 S.Ct. 2952 (1980).

C. The Death Penalty Was Not Based On Erroneous Factual Conclusions.

In its sentencing order, the trial court referred to "the brutal consciousless torture, rape, and deliberate killing of [the victim]." Petitioner's App. at 7h. The petitioner alleges that since he was not convicted of rape, the trial court's reference to rape indicates a mistaken factual predicate for the sentence. This argument ignores the context of the trial court's statement. The petitioner was charged with seven separate offenses including sexual intercourse without consent, the Montana version of the law against rape. The evidence introduced at trial overwhelmingly supported a finding that the victim was forcibly sexually assaulted by the petitioner. (Tr. at 601-04; 607-13; 1752-53; 2054-56; 2085.) The jury did not convict on the sexual intercourse without consent count because the trial court instructed them not to reach that count if it found the petitioner guilty of deliberate homicide and kidnapping. Petitioner's App. at 45g. However, the jury's guilty verdict on Count II, deliberate homicide while

engaged in the commission of or attempt to commit sexual intercourse without consent or assault shows that the jury found that the petitioner in fact assaulted and raped the victim. The assault and the rape cannot be factually separated. In addition, the trial court's sentencing order clearly and correctly states the offenses of which the petitioner was convicted, belying any assertion that the trial court was mistaken as to those offenses. Petitioner's App. at 5h.

The petitioner also asserts that the trial court erred in computing the date of the petitioner's parole eligibility. In fact, the statement that the petitioner would be eligible for parole in twelve and one-half years less good time allowances was a correct statement of the law then in effect:

> That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter (1/4) of his full term, less good time allowance off, as provided in section 80-4-70; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half years; ***

Section 95-3214, R.C.M. 1947 (Supp. 1974) (now codified as amended at 46-23-201, Mont.Code Ann.). App. at A-2.

III. THE COURT SHOULD DENY THE WRIT AS TO THE PLEA BARGAIN ISSUE BECAUSE THE RECORD FAILS TO DISCLOSE AN ENFORCEABLE PLEA BARGAIN AGREEMENT.

Citing Santobello v. New York, 404 U.S. 257 (1971), the petitioner requests this Court to review and enforce a purported plea bargain agreement. The Montana Supreme Court, reviewing the record of the trial court, determined that there never was a plea bargain agreement that could be enforced. McKenzie III, 608 P.2d at 439. That finding, although not binding on this Court, is entitled to great

weight. Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976); Pickering v. Board of Education, 391 U.S. 563, 578 n. 2 (1968).

Santobello held that when a defendant enters a plea of guilty in exchange for an agreement by the prosecutor to make a sentencing recommendation, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. The defendant by pleading guilty gives up important constitutional rights, including the right to trial by jury, the right to confront witnesses, and the right against self-incrimination. The petitioner here never waived these rights. At most, his attorney made vague and unspecified disclosures about trial strategy in an attempt to reach a tentative plea bargain agreement.

The petitioner's version of the plea bargain agreement is set forth in his attorney's affidavit dated December 30, 1974 (Ct. File Item 99), a copy of which is attached in the Appendix at A-3. The information allegedly disclosed by defense counsel to the prosecutors is set forth in general terms:

> Subsequent to this meeting with the court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influence of public opinion by the Sheriff of Pondera County (sic), your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreements heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury and where certain assumptions being mde by the Sheriff and Prosecution were fallacious. *** (Page 4.) (Emphasis supplied.)

App. at A-7.

Nowhere does the petitioner explain how any such disclosure may have interfered with his defense or given the prosecutor an unfair advantage. He did not waive any right to object to admission of evidence based on ineptitude in the investigation. The affidavit of the petitioner's counsel reveals that plea bargaining was initiated by defense counsel, who suggested the possibility of a plea almost a year after the petitioner's arrest. Even after suggesting the possibility of a plea for a second time, the prosecutor "left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor ***." (Affidavit, p. ', App. at A-3.) The affidavit contains conclusory statements of defense counsel's "understanding" that a "final and complete bargain" had been struck, but no evidence is offered to show that the prosecutor committed himself to any agreement. The petitioner's own evidence shows no more than defense counsel's voluntary disclosure of vague information about trial strategy in an effort to "nail down" a favorable plea arrangement for his client. The record fails to present a significant constitutional issue as to the existence of an enforceable plea bargain.

IV. THE COURT SHOULD DENY THE WRIT AS TO THE SEARCH AND SEIZURE QUESTIONS BECAUSE THE RECORD PRESENTS NO SIGNIFICANT FOURTH AMENDMENT ISSUES.

A. The Sworn Affidavit Overwhelmingly Supports A Finding Of Probable Cause To Search The Petitioner's House And Truck.

Every search and seizure presents a question of probable cause, and the authority of law enforcement officers to seize particular items is always at issue where an item

seized is not exactly described in the warrant. Petitioner's probable cause arguments are based on the erroneous assumption that the facts which support a finding of probable cause to arrest cannot, without more, support a probable cause finding for a search warrant. The same facts can in some cases support a probable cause finding for both an arrest and a search warrant.

Probable cause determinations are not made on technicalities and "issuing magistrates are not to be confined by niggardly limitations or by restrictions on their use of common sense." Spinelli v. United States, 393 U.S. 410, 419 (1969). An application of common sense to the facts presented to the justice of the peace in this case overwhelmingly supports findings of (1) probable cause to believe that the victim, Lana Harding, had been assaulted and abducted; (2) probable cause to believe that the petitioner was connected with that assault and abduction; (3) probable cause to believe that petitioner's pickup truck had been used in connection with the assault and abduction; and (4) probable cause to believe that items of the petitioner's or victim's clothing were to be found in the petitioner's house. The facts supporting the issuance of the search warrant are recited in the majority opinion in McKenzie III, 608 P.2d at 437-38. A copy of the affidavit supporting the application for the search warrant is reproduced in the dissenting opinion. McKenzie II, 581 P.2d at 1240. The victim was missing. There was evidence of a struggle inside her teacherage, and a drag trail and tennis shoe were discovered outside the teacherage. Blood stains and a woman's watch were discovered in the same area where petitioner and his pickup truck were observed the evening of the abduction. The petitioner was observed at that time in

a highly nervous, excited and out of breath condition. He solicited help in starting his truck, which was parked one hundred feet from where the watch and blood stains were discovered, and indicated that he was going home.

The clothes worn by the petitioner the evening of the abduction were obvious evidence in the criminal investigation. The abduction had taken place under circumstances indicating violence and struggle. The clothes worn by the assailant could be expected to have the victim's hair, tissue, or blood on them. The petitioner, who lived nearby, would likely have worn those clothes home. These facts are drawn from the written affidavit reproduced in the dissenting opinion to McKenzie II, 608 P.2d at 1240. Both the facts in the affidavit and the inferences drawn therefrom by the magistrate are rationally reviewable by an appellate court. There is no significant probable cause issue in this case.

B. The Search Warrant Did Not Authorize A General Exploratory Search Of The Petitioner's House, And The Record Does Not Show That Such A Search Was Conducted.

The petitioner's claim that the search of his house was a "general" search based on a "general warrant" is based on language authorizing the search and seizure of "any other contraband articles." This language appeared after an enumeration of specific articles of clothing of the victim and the petitioner for which the search was authorized. The validity of the warrant is not destroyed by use of the phrase, "and any other contraband articles." The warrant did not authorize a general exploratory search. The test of the warrant is whether the place to be searched and the items to be seized are as precisely identified in the

warrant as the nature of the activity permitted. When an exact description of items is made impossible by the circumstances, reference to a generic class of the items to be seized is sufficient. James v. United States, 416 F.2d 467, 473 (5th Cir. 1969), cert. denied, 397 U.S. 907 (1970). The phrase "any other contraband" is similar to the phrase "any other evidence", use of which has been sustained, and is not an authorization for a general search. Quigg v. Estelle, 492 F.2d 343, 345 (9th Cir.), cert. denied 419 U.S. 848 (1974). As Quigg points out, such a phrase is merely a codification of the authority to seize certain items under the "plain view doctrine."

The petitioner takes issue with the seizure of two items of clothing, a pair of Red Wing boots and a plaid jacket, which were not specifically enumerated in the warrant. The petitioner ignores the plain view doctrine as it applies to the facts of the search. Under the plain view doctrine, evidence may be seized if (1) the initial intrusion of the police was justified by a valid search warrant; (2) the discovery of the unlisted items was inadvertent and (3) the evidence seized was of an incriminating nature. Coolidge v. New Hampshire, 403 U.S. 443, 464-70 (1971). In the present case, the officer who executed the warrant testified that the Red Wing boots were seized because their tread design was similar to tracks observed outside the teacherage, and that the clothing seized was basically that which an individual observed petitioner wearing on the night of the homicide. The items were incriminating objects which officers had probable cause to believe were evidence of a crime, and were properly seized under the plain view doctrine. United States v. Ross, 527 F.2d 984 (4th Cir. 1975), cert. denied 424 U.S. 945 (1976); United States v. Sedillo,

TRUSSER'S HELENA

496 F.2d 151 (9th Cir.), cert. denied 419 U.S. 947 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 11th day of September 1980.

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

CHRISTIAN D. TWEETEN
Assistant Attorney General

NO. 80-5123

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DUNCAN PEDER McKENZIE, JR.,

PETITIONER,

-v-

STATE OF MONTANA,

RESPONDENT.

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

THOMSON PRINTING HELENA

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ADDITIONAL STATUTES INVOLVED

Section 94-2-101(52), R.C.M. 1947:

> "Purposely" - a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

Section 95-2201, R.C.M. 1947:

> This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

Section 95-2203, R.C.M. 1947:

> No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense.

Section 95-2204, R.C.M. 1947:

> Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall inclue a physical and mental examination of the defendant when it is desirable in the opinion of the court.

Section 95-3214, R.C.M. 1947 (Supp. 1974):

PAROLE AUTHORITY AND PROCEDURE. (1) The board shall release on parole, by appropriate order, any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided:

(a) that no convict serving a time sentence shall be paroled until he has served at least one-quarter (¼) of his full term, less good time allowances off, as provided in section 80-1905; except that any convict serving a time sentence may be paroled after he has served, upon his term of sentence, twelve and one-half (12½) years.

(b) No convict serving a life sentence shall be paroled until he has served twenty-five (25) years, less the good time allowances off, as provided in section 80-1905.

(2) Within two (2) months after his admission and at such intervals thereafter as it determines, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, and attitude in prison, and the reports of any physical and mental examinations which have been made.

(3) Before ordering the parole of any prisoner, the board shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board.

(4) The board may adopt other rules it considers proper or necessary, with respect to the eligibility of prisoners for parole, and the conduct of parole hearings or conditions to be imposed upon parolees. When an order for parole is issued it shall recite the conditions thereof.

THURBER'S HELENA

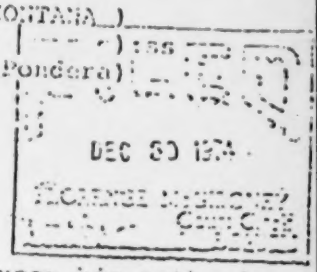
IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

STATE OF MONTANA,
Plaintiff,
vs.
DUNCAN PEDER McKENZIE, JR.,
Defendant.

Criminal Action No. 4584

AFFIDAVIT

STATE OF MONTANA)
: ss
County of Pondera)



BARNEY RHAGAN, after being duly sworn upon his oath, deposes and says:

That he is one of the attorneys appointed and acting on behalf of DUNCAN PEDER McKENZIE, JR., Defendant herein;

That on or about the 9th day of December, 1974, Defendant authorized your affiant, together with co-counsel, CHAS. L. JACOBSON, to enter into meaningful negotiations with the representatives of the State of Montana for the purpose of plea bargaining in the above entitled action;

That subsequent to that date various offers, feelers or suggestions concerning plea bargaining were presented to the Pondera County Attorney; however, at each such attempt said County Attorney left your affiant with the impression that he either did not appreciate the nature of your affiant's efforts or that he would have to secure the advice of the Special Prosecutor (who is also the County Attorney elect, having defeated the County Attorney in the November election);

That as of December 27th, 1974, your affiant had not received any direct response from his "offers, feelers and suggestions" either from the County Attorney or the Special Prosecutor; that on said date your affiant came into personal contact with the Special Prosecutor, and directly presented the matter of the De-

fendant's willingness to enter into a bargaining situation whereby the Defendant would enter a plea of guilty as to some specific allegations contained in the Information in return for a pre-determined and agreed-upon sentence;

Such negotiations proceeded, now with the efforts and attendance of both counsel for Defendant and both counsel (County Attorney and Special Prosecutor) for the State; on the morning of December 22nd, 1974, (Sunday) it was mutually agreed by all representatives of the prosecution and Defendant that the Defendant would enter a plea of Guilty to portions of the allegations contained in Counts II and VII; that said plea would have the effect of pleading Guilty to Deliberate Homicide while in the commission of a felony, to-wit: Aggravated Assault with a heavy weapon, and Guilty to Aggravated Assault while in the commission of bodily injury upon the deceased with a weapon, to-wit: namely, a rope; and that Defendant would receive a sentence of fifty (50) years and twenty (20) years respectively; both sentences to run concurrently and not consecutively; all parties agreed and understood that this agreement would not be binding upon, and would be subject to the approval of the presiding Judge in this cause;

The Special Prosecution expressed fears concerning public reaction to this effort, and most expressly was worried over the reaction of the Sheriff of Fondera County and the family of the deceased;

It was the Special Prosecutor's avowed initial intention to present all of this to the said sheriff and family of the deceased before making our mutual presentation to the Court; it was the apparent understanding of all concerned, and especially this affiant, that if the Prosecution could not secure the approval of said Sheriff and the family of the deceased, that there would probably not be any necessity of presenting the situation to the Court;

Your affiant then advised the Prosecutor that he was privy to certain information, that would be used at trial, that could be used to demonstrate to the Sheriff that his efforts had put the Prosecution into such a position that it was in their best interest to proceed in this manner; such information was not provided the State at this time; and it was understood that such would be provided upon a committment by the Court;

The Prosecution then deemed it more expedient to approach the Court with this situation prior to any other consultation; that it was never the intention of your affiant, or his co-counsel to ever allow the Sheriff of Pondera County or the family of the deceased, to have the power of "veto" over the negotiations then taking place, but that since contact with them would be made prior to our mutual approach to the Court, no harm to Defendant would be done; however, your affiant's attitude as it related to their being consulted after the mutual contact with the Court was opposite.....if the Court refused to accept the plea bargain, the matter would be halted, or if the Court accepted the offer, the Prosecution's contact with the Sheriff and family of the deceased would be for the purpose of pro forma consultation for the purpose of courtesy and to attempt to reduce the possibility of these parties causing adverse public opinion within Pondera County against either the County Attorney or the Special Prosecutor.

On Monday, December 23rd, 1974, all counsel in this matter met with the Honorable R. J. Nelson in his chambers in Great Falls for approximately three (3) hours; although the Court expressed a dislike for the entire affair, and especially the length of sentence agreed upon, the Court agreed to allow the plea and give the sentence agreed upon (although the Court felt it could only give the fifty (50) year sentence for both offenses; that was mutually understood and agreed upon).

The Court then ordered all parties, including Defendant to

appear on Monday, December 30, 1974; to appear and at this time Defendant would withdraw his plea and enter his new plea as per our mutual understanding.

Subsequent to this meeting with the Court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influencing of public opinion by the Sheriff of Pondera County, your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreement heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the Prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury, and where certain assumptions being made by the Sheriff and Prosecution were fallacious;

That your affiant and co-counsel left this meeting with the complete and unequivocal understanding that a final and complete bargain had been struck by all parties including the Court; that counsel for the Prosecution were then going to apprise the family of the deceased and the Sheriff of Pondera County of this agreed upon situation;

That on Saturday, December 28, 1974, at approximately 3:00 o'clock P. M., the Special Prosecutor advised your affiant that he had travelled, together with the County Attorney, to Polson, Montana, and had contacted the family of the deceased (Hardings) and their attorney, Senator Jean Turnage; that Mr. Harding was irascible to the point of threatening violence upon the Defendant and his counsel, and that they were adamant that no such understanding should be allowed to proceed; and that the Special Prosecution then proceeded to rationalize his refusal to proceed

in accordance with the agreement already made; that as part of such rationalization, the Special Prosecutor complained that Defendant could have backed out of the deal at any time prior to sentencing; that your affiant agreed that such were possible, but for Defendant to do so he would have to do so pro se and that his counsel would have had a duty to make every effort to withdraw as counsel of record, and that any resulting delay in trial would have been caused by Defendant;

That your affiant believes, and has reason to believe, that in spite of the "Gag Order" heretofore filed in this cause, counsel for the Prosecution has not only discussed this matter with the heretofore mentioned Hardings, but has also been in direct contact with two other District Judges seeking their advice and counsel;

That your affiant believes, and has reason to believe, that the counsel for the State, both County Attorney and Special Prosecutor, have misled counsel for Defendant, violated, or are attempting to violate, the rights of Defendant, and have engaged in unethical conduct in violation of the Canons of Professional Ethics and the Code of Professional Responsibility (See Canons 5,6,7,8,9,15,16,22,24,25,31,32,35, and 41 of the Canons of Professional Ethics).

That your affiant believes,and has reason to believe, that he has a duty to the Court, his client, and counsel for the Prosecution to bring this entire matter before, and to lay it exposed to, this Honorable Court in the interests of justice and fair play to both the State and the Defendant.

Further your affiant sayeth not.

DONE this 30th day of December, 1974.

BARRY BRYAN